

STATE OF MICHIGAN
COURT OF APPEALS

CHARTER TOWNSHIP OF YPSILANTI,

Plaintiff-Appellee,

v

TED MILLER and 3 D MERCHANDISE
BROKERS, INC,

Defendants-Appellants.

UNPUBLISHED

December 27, 2002

No. 231923

Washtenaw Circuit Court

LC No. 00-001066-CZ

Before: Whitbeck, C.J., and Zahra and Murray, JJ.

WHITBECK, C.J. (*dissenting*).

I respectfully dissent from the majority's conclusion that Ypsilanti Charter Township's ordinance governing secondhand dealer is constitutionally sound, rather than vague on its face.

I. Basic Facts And Procedural History

The township enacted an ordinance regulating pawnbrokers, as well as junk and secondhand dealers.¹ The primary mechanism for regulating these dealers is the licensing provision in § 22-96, which states:

It shall be unlawful for any person, corporation, or member of a copartnership or firm to engage in the *business of a pawnbroker, secondhand dealer or junk dealer*, whether as an owner, employee or otherwise, within the boundaries of the township without first obtaining a license therefor issued in accord with the provisions of this article.^[2]

Further, the ordinance bars a "person, corporation, or member of a copartnership or firm" from "operat[ing] upon an expired or transferred pawnbroker, secondhand dealer or junk dealer's license."³

¹ Ypsilanti Charter Township Ordinances, art III.

² Ypsilanti Charter Township Ordinances, art III, div 2, § 22-96 (emphasis added).

³ *Id.* at § 22-102(a).

The ordinance defines pawnbrokers, secondhand dealers, and junk dealers, stating:

Pawnbroker means any person corporation or member of a copartnership or firm who loans money on deposit or pledge of personal property, or other valuable thing, other than securities or printed evidence of indebtedness, or who deals in the purchasing of personal property or other valuable thing on condition of selling the same back again at a stipulated price.

Secondhand dealer or *junk dealer* means any person, corporation, or member of a copartnership or firm whose principal business is that of purchasing, storing, selling, exchanging and receiving secondhand personal property of any kind or description.^[4]

The ordinance also creates the license application⁵ and revocation⁶ processes, prescribes the necessary contents of the application,⁷ authorizes a background investigation for the applicant,⁸ and mandates a one-year term for the license.⁹ Further, the ordinance includes a variety of conditions related to the way the licensee conducts business, such as recordkeeping¹⁰ and fingerprinting.¹¹ The ordinance makes any violation a misdemeanor subject to a \$500 fine, imprisonment for as many as ninety days, or both.¹² Overall, this ordinance is substantially similar to MCL 445.401 *et seq.*, the statute regulating secondhand and junk dealers in cities and villages, but not townships, which also defines a secondhand dealer or junk dealer on the basis of the dealer's "principal business."¹³

Miller owns 3 D Merchandise Brokers, Inc., which is located in the township and sells both new and used items. On November 5, 1990, April 15, 1993, November 30, 1993, November 30, 1994, and December 8, 1995, Miller applied for secondhand dealer's licenses. On the respective applications, he described the services he would provide as "retail new & used merchandise," "second hand dealer," "retail trade new and used merchandise," "second hand dealer," and "new & used merchandise retail."¹⁴ In each instance, the township issued him a license or renewed his existing license. The 1999 and the 1998-1999 Ameritech telephone book listed 3 D in the yellow pages under the heading "Second Hand Stores." In a small

⁴ Ypsilanti Charter Township Ordinances, art III, div 1, § 22-81 (emphasis in the original).

⁵ Ypsilanti Charter Township Ordinances, art III, div 2, §§ 22-97, 22-100.

⁶ *Id.* at § 22-103.

⁷ *Id.* at § 22-99.

⁸ *Id.* at § 22-98.

⁹ *Id.* at § 22-102.

¹⁰ Ypsilanti Charter Township Ordinances, art III, div 3, § 22-117.

¹¹ *Id.* at § 22-118.

¹² *Id.* at § 22-127.

¹³ MCL 445.403; see also MCL 445.471.

¹⁴ Capitalization altered.

advertisement above its telephone number, 3 D included text that said, “We buy & sell close-outs, salvage & discontinued merchandise and anything of value.”¹⁵

For unknown reasons, the township did not issue licenses for a number of years after 1995. According to the township, Miller did not apply for a new license in 1997. In 1999, the township clerk reportedly sent Miller a letter informing him that he had to apply to have his secondhand dealer’s license renewed. Miller allegedly responded that he no longer needed a license. A letter from a deputy sheriff for Washtenaw County explained that Miller believed “that second hand personal property that has not yet been unpacked or used, purchased from a private individual, should be considered ‘new’ merchandise, the same as new merchandise purchased from a manufacturer or wholesale distributor.” Thus, the parties reached an impasse, with Miller maintaining that he did not need a secondhand dealer’s license and the township insisting that he apply for just such a license.

On September 21, 2000, the township filed a verified complaint for a “preliminary, permanent injunction and order to show cause against defendants for operating a second hand dealer’s business without a license.”¹⁶ The complaint included an affidavit from Washtenaw County Sheriff’s Deputy Tim Anuszkiewicz, who alleged in pertinent part:

5. For the past eight months, I have inspected, on average 2-3 times per week, 3D Merchandise Brokers Inc.’s personal property offered for sale to the general public.

6. Based upon my observations, the majority of the business transacted at 3D Merchandise Brokers Inc. pertains to purchasing, storing, selling, exchanging and receiving second hand personal property.

7. Based on my observations, I estimate between [sic] 70% of the merchandise offered for sale is used personal property.

8. My estimate is based upon the value of the personal property offered for sale, not the quantity of items of personal property offered for sale.

At the show cause hearing, the township argued that 3 D was principally a secondhand business because it presented itself to the public as a secondhand business, its records showed that 3 D purchased secondhand goods from the public on a daily basis, Anuszkiewicz estimated that a majority of 3 D’s business was in secondhand goods, and Miller had been previously licensed as a secondhand dealer for this business. The township proposed interpreting the term “principal business” in the definition of a secondhand dealer to mean activity “in excess of 50 percent.” Defendants, however, emphasized that there were many different ways to measure someone’s “principal business,” including the number of items sold, the wholesale value of items, and the retail value of items. Defendants argued that the ordinance was unconstitutionally vague because it did not give reasonable notice to those individuals and businesses it affected

¹⁵ Capitalization altered.

¹⁶ Capitalization altered.

that they were subject to regulation. Defendants also argued that their goods were not used, but that 3 D was akin to a hardware store that sold goods that had not been used but also did not have individual packaging. Defendants added that they believed that the township was selectively enforcing the ordinance because it did not require used car dealers and businesses that dismantled cars for parts to resell to obtain a secondhand dealer's license.

The trial court subsequently issued a written opinion and order. After reciting the history of the case and the parties' arguments, the trial court looked to the analogous statutory scheme, MCL 445.401 *et seq.*, noting that there was no case law interpreting the term "principal business" as used in MCL 445.403. The trial court then reviewed a number of cases from foreign jurisdictions, all of which held that "principal business" or similar terms were not too vague to pass constitutional muster when defining the individuals and entities to the regulations governed. The trial court also noted that the term "principal business" is used without definition in other Michigan statutes. Accordingly, the trial court reasoned, "[t]he generally accepted, common sense meaning of the phrase [principal business] and widespread use in our statutes is that a majority, or 51% of the business conducted determines whether the applicable statute will apply." The trial court went on to explain that

the township has estimated that 70% of the value of defendant's property constitutes used goods offered for sale. Neither party has submitted evidence that any method other than valuation of the property offered for sale is used by the township to determine whether defendant meets the definition of a secondhand dealer. It appears that this is the standard used by the township to enforce the ordinance. Defendant was previously licensed as a secondhand dealer and has many years['] experience in the business of secondhand sales. No documentation is submitted. nor does defendant argue, that in [the] years he applied for a secondhand dealer license, some other method of valuation was used. Defendant had sufficient notice of which businesses are subject to the ordinance, and the ordinance is not unconstitutionally vague.

Accordingly, the trial court granted the township an injunction barring defendants from "operat[ing] a second hand dealer's business without a license." Defendants now argue that the trial court erred when it concluded that the ordinance was not vague.

II. Standard Of Review

Whether an ordinance is constitutional presents a question of law, which this Court reviews de novo.¹⁷

III. Due Process

Attorneys often refer colloquially to the "void-for-vagueness" doctrine. In actuality, a party alleging that a law is constitutionally invalid because it is vague challenges the law on due

¹⁷ *Saginaw Co v John Sexton Corp*, 232 Mich App 202, 222; 591 NW2d 52 (1998).

process grounds.¹⁸ A law is unconstitutional because it is vague if (1) it does not provide fair notice of prohibited conduct, (2) it encourages enforcement that is arbitrary or discriminatory, or (3) it is so broad it restricts First Amendment rights.¹⁹ The constitutional touchstone for this ordinance, which makes violations a crime, is whether it defines “the criminal offense ‘with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.’”²⁰ On appeal, defendants only argue that this ordinance fails to give adequate notice of the prohibited conduct.

The ordinance is crystal clear in defining the criminal act defendants are alleged to have committed: “engag[ing] in the business of a . . . secondhand dealer . . . within the boundaries of the township without first obtaining a license therefor issued in accord with the provisions of this article.”²¹ Whether a person or entity has obtained such a license is an objective and verifiable fact, and not at all vague. Defendants did not have this sort of license at the time the township instituted this action.

The problem with the ordinance, as defendants claim, is that it defines who is subject to this licensing requirement for secondhand dealers – and the penalties imposed for not having a license when necessary – on the basis of the term “principal business.” Without further explanation of that term, no one can know whether the value of the secondhand items, the number of the secondhand items, the percentage of business income derived from dealing in those items, the percentage of time spent dealing in those items, or other factors are relevant to determining what constitutes a “principal business” in secondhand dealing. For instance, under the language in the ordinance, no one can be certain whether a person with a full-time job in the service industry may, nevertheless, need a license to sell secondhand goods at a weekend flea market in the township. No one can tell whether a person who sells many inexpensive secondhand items would be able to avoid the need to obtain a license by selling a single, expensive, new item for an amount in excess of the profit from the secondhand items. Nor is it possible to know from the text of the ordinance whether to aggregate all items sold at multiple businesses owned or operated by the same dealer in order to determine whether the dealer’s principal business is in secondhand goods. My concerns are not an abstract test of how the ordinance might operate “under every conceivable set of circumstances,”²² but a recognition that Miller’s description of the nature of 3 D’s business – which he claimed had changed from previous years – directly conflicts with the township’s definition of what constitutes a “principal business” in secondhand goods.

¹⁸ *State Treasurer v Wilson (On Remand)*, 150 Mich App 78, 80; 388 NW2d 312 (1986); see US Const Am XIV; Const 1963, art 1, § 17.

¹⁹ *City of Lansing v Hartsuff*, 213 Mich App 338, 343; 539 NW2d 781 (1995), quoting *People v Lino*, 447 Mich 567, 575-576; 527 NW2d 434 (1994).

²⁰ *Lino, supra* at 575-576, quoting *Kolender v Lawson*, 461 US 352, 357; 103 S Ct 1855; 75 L Ed 2d 903 (1983).

²¹ Ypsilanti Charter Township Ordinances, art III, div 2, § 22-96.

²² *Wysocki v Felt*, 248 Mich App 346, 355; 639 NW2d 572 (2002).

There is no published case law construing this ordinance or the analogous statute to provide this Court with any guidance. The dictionary provides little help. According to the dictionary, the ordinary meaning of the word “principal” is “first or highest in rank, importance, value, etc.; chief, foremost.”²³ Among the most relevant definitions of the word “business” are “an occupation, profession, or trade” and “the purchase and sale of goods in an attempt to make a profit.”²⁴ Read with each other and in the ordinance’s context, these two words can be interpreted to mean that “any person, corporation, or member of a copartnership or firm whose” chief occupation is “purchasing, storing, selling, exchanging and receiving secondhand personal property of any kind or description” to make a profit is subject to the ordinance. However, this says nothing more about the nature of the conduct that requires a license than the term “principal business.”

With ambiguous text and without help from the dictionary, the rules of interpretation allow courts to examine the purpose of the ordinance in order to see whether that helps clarify the meaning of “principal business.”²⁵ Viewed as a whole, the primary purpose of the ordinance appears to be to prevent trafficking in stolen goods under the guise of a legitimate secondhand-goods business.²⁶ Consider, for instance, that the ordinance requires the license applicant to submit to a background check,²⁷ provide significant identifying information,²⁸ including a complete set of fingerprints,²⁹ the applicant’s “[b]usiness, occupation, or employment” in the three years preceding the application,³⁰ and “[a]ll criminal convictions other than traffic violations and the reasons therefor.”³¹ The ordinance then charges the sheriff with recommending whether to grant the license to the applicant in light of the applicant’s criminal history, and other factors.³² These requirements all attempt to ensure that honest people, not criminals, deal in secondhand goods. The ordinance strives to ensure that the secondhand dealers only conduct business with honest individuals by requiring the dealer to keep detailed records regarding the seller, in addition to taking at least one fingerprint or thumbprint from the seller, which is then transmitted to a law enforcement agency.³³ Finally, the ordinance provides a mechanism for ensuring the secondhand goods are not stolen by allowing the detailed records

²³ *Random House Webster’s College Dictionary* (1997), p 1035.

²⁴ *Id.* at 178.

²⁵ See *Marquis v Hartford Accident & Indemnity*, 444 Mich 638, 644; 513 NW2d 799 (1994).

²⁶ To be clear, nothing in the record remotely suggests that Miller and 3 D deal in stolen goods.

²⁷ Ypsilanti Charter Township Ordinances, art III, div 2, § 22-98(a).

²⁸ *Id.* at § 22-99.

²⁹ *Id.* at § 22-99(9).

³⁰ *Id.* at § 22-99(10).

³¹ *Id.* at § 22-99(11).

³² *Id.* at § 22-100.

³³ Ypsilanti Charter Township Ordinances, art III, div 3, §§ 22-117, 22-118

of the transactions and items to be inspected at any time and by requiring the licensee to share information with law enforcement agencies.³⁴

The interpretation of the ordinance that the trial court and township applied revolved around the value of the secondhand property sold at 3 D as a percentage of the value of all the property sold at 3 D. This interpretation, while concise and easy to apply, bears little relationship to the ordinance's goal of preventing trafficking in stolen goods, which may have little monetary value, and thus is a less obvious interpretation. Under this interpretation, as long as Miller kept the value of his transactions in secondhand goods just below fifty percent of the value of his total transactions, he could deal in a large number of secondhand goods at 3 D without a secondhand dealer's license, and without keeping the records and reporting the information the ordinance requires. Conversely, if Miller were to sell one very valuable antique at 3 D, but otherwise sell only new goods of less value, he would likely have to obtain a secondhand dealer's license.

More importantly, a statute, and by analogy an ordinance, "is sufficiently definite if its meaning can fairly be ascertained by reference to judicial interpretations, the common law, dictionaries, treatises, or the commonly accepted meanings of words."³⁵ Note that this statement of the law concerning vagueness refers to those sources that help ordinary people understand the meaning of an ordinance, and thereby avoid prohibited conduct.³⁶ Definitions of an ordinance espoused by municipal employees that do not track judicial interpretations, the common law, dictionaries, treatises, or the commonly accepted meanings of words simply cannot make an ordinance constitutionally sound. Rather, this sort of internal definition may very well lead to selective and arbitrary enforcement of an ordinance. Under the facts of this case, I fail to see how Miller could have anticipated that the township would have adopted this particular definition even if he had been a licensee in the past.

I do not mean to suggest that the value of goods is always an inappropriate means of determining whether someone's "principal business" is in secondhand goods or that it would be improper for the ordinance to prescribe more than one way to measure whether someone's "principal business" is in secondhand goods. Nor do I intend to imply that the term "principal business" is ambiguous in other contexts. The majority has identified a number of other statutes that use the term "principal business" precisely because, in those very different contexts, there are so few variables that could affect the term's meaning or because the statutes at issue provided additional clues regarding its meaning. Rather, my point is that, on its face, *this* ordinance is insufficiently clear to inform an ordinary "person, corporation, or member of a copartnership or firm" that the township looked to the value of secondhand goods – or any other specific factors –

³⁴ *Id.* at § 22-117.

³⁵ *People v Noble*, 238 Mich App 647, 652; 608 NW2d 123 (1999).

³⁶ See *People v Boomer*, 250 Mich App 534, 539; ___ NW2d ___ (2002), quoting *Grayned v City of Rockford*, 408 US 104, 108-109; 92 S Ct 2294; 33 L Ed 2d 222 (1972) ("[Because] we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.").

when determining whether a secondhand dealer's license was necessary. Thus, I believe that the ordinance, as written and applied to Miller and 3 D, is unconstitutionally vague.

/s/ William C. Whitbeck